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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/853,391	05/11/2001	Timothy William Dake	8557	6421

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EXAMINER

PRATT, HELEN F

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 12/05/2002

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Please find below and/or attached an Office communication concerning this application or proceeding.

**Office Action Summary**

Application N .

09/853,391

Applicant(s)

DAKE ET AL.

Examiner

Helen F. Pratt

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 23 October 2002.
- 2a) ☐ This action is FINAL. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 4) ☒ Claim(s) 1-101 is/are pending in the application.
- 4a) Of the above claim(s) 86-101 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-85 is/are rejected.
- 7) ☒ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

**Priority under 35 U.S.C. §§ 119 and 120**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) \_\_\_\_\_
- 4) ☐ Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other:

## DETAILED ACTION

### *Claim Rejections - 35 USC § 103*

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1, 2 are rejected under 35 U.S.C. 103(a) as being unpatentable over Ishida et al. (6,399,132) or Chuang et al. in view of Sweet'n Low (Tradename).

Ishida et al. disclose a composition containing a high intensity sweetener (HIS) and a bulking agent (col. 4, lines 25-38). The particle size of the acesulfame K (ACE-K) is about 250 UM or less and the APM (aspartame) has a particle size of about 500 microns or less (col. 3, lines 53-67). Fiber, sugar or oligosaccharides are considered to be bulking agents because they add bulk but do not combine with the sweetener. Chuang et al. disclose the use of bulk aspartame and aspartame coated onto acid in powdered drink mixes (abstract. The aspartame particles can be about 150 microns (col. 2, lines 54-60). Claims 1, 2 differ from the reference in the particular amount of bulking agent. However, as bulking agents are generally found with sweeteners due to there high intensity as sweeteners as in SWEET'N LOW (TRADENAME) which contains 3.5% calcium saccharin and bulking agents such as dextrose and cream of tartrate and calcium silicate (drying agent). Here the bulking agents have to be less than 95%. Therefore, it would have been obvious to one of ordinary skill in the art to

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make a sweetener composition with the claimed particle size and a particular amount of bulking agent.

Claims 3-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to claims 1, 2 above, and further in view of Valentine et al. (US 2001/0016208 A1).

Claim 3 requires the addition of various nutrients such as vitamins and minerals, and claim 4 a flavor agent. Valentine et al. disclose a composition which can be a particulate food which contains Aspartame and mannitol. The particulate products can contain vitamins and dietary supplements (abstract and paragraph. [ 0038] ). The mixture of ingredients discloses flavorant , agglomerate of mannitol and aspartame , and bulking agents such as sodium bicarbonate ( para. [0103]). Vitamins are generally known to encompass the claimed vitamins. Therefore, it would have been obvious to use vitamins and flavors in the claimed composition.

Claim 5 further requires the bulking agent sucrose. Ishida et al. disclose the use of sucrose in the composition (col. 4, lines 25-38). The sucrose is considered to be a bulking agent which is the same thing as a diluent or excipient as disclosed in the reference (col. 4, lines 34-36). Therefore, it would have been obvious to use sugar as a bulking agent as disclosed by Ishida et al.

Claim 6 further requires various forms of flavorants. However, nothing new is seen in the various types of flavor agents. Therefore, it would have been obvious to use known types of flavorants in the claimed composition.

Claim 7 further requires particular HIS's which have been disclosed as in claim 1 and are obvious for those reasons.

Claim 13 requires a particular solubility of the composition. As the claimed composition has been shown, it is seen that it would have had the required solubility absent a showing to the contrary. Therefore, it would have been obvious to make a composition with the claimed composition.

Claims 8 –12 are rejected under 35 U.S.C. 103(a) as being unpatentable over the above combined references as applied to claims 1-7 and 13 above, and further in view of Menzi et al.

Claim 8 requires that the total flavor agent also have a particle size greater than about 106 microns. Menzi et al. disclose a granulated flavor agent, which is larger than 106 microns, i. e. is 0.2mm to about 1.5 mm, which can be used in an instant, drink powder (col. 6, lines 45-48 and col. 4, lines 40-45). Therefore, it would have been obvious to use known particle sizes the in composition of the combined references.

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Claim 9 further requires various amounts of ingredients. However, as the basic amounts of ingredients has been disclosed as in claim 1, it would have been within the skill of the ordinary worker to vary the amounts of ingredients, especially as the function and sweetness of each ingredient is known. Therefore, it would have been obvious to vary the amounts of ingredients in the claimed composition.

Claim 10 further requires that less than 10% of the HIS have particles of less than 45 microns. Ishida discloses the use of ACE-K, which has a particles size of 250 microns as above. The reference does not state what amount of particles would have

been less than 45 microns. It does say that the larger particle size of 250 to 500 microns is required (col. 3, lines 55-70). Therefore, it would not serve any useful function to have small particle sizes of 45 microns. Therefore, it would have been obvious to use larger size particle sizes as disclosed by Ishida.

Claim 11 requires choosing 3 nutrients. It would have been within the skill of the ordinary worker to choose whatever of the known nutrients which would be useful in making a particular composition, especially as Valentine et al. has disclosed that it is known to add vitamins in general. Therefore, it would have been obvious to limit the number of nutrients in the claimed composition.

Claim 12 requires a particular solubility of the composition. As the claimed composition has been shown, it is seen that it would have had the required solubility absent a showing to the contrary. Therefore, it would have been obvious to make a composition with the claimed composition.

The limitations of claims 14-29 have been discussed above and are obvious for those reasons except for the particular amount of HIS having the particle size of greater than 106 microns. However, Ishida et al. disclose the claimed particle sizes as above and does not disclose that any percent of the ACE-K which are of a smaller size. Absent a showing to the contrary, it is seen that Ishida et al. discloses 100% particles within the claimed size as the reference does not contemplate the smaller sizes, except to say "up to", but then even start from 250 to 500 microns. Therefore, it would have been obvious to use larger size crystals than 45 microns.

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→ Claim 30 further requires the use of minerals with the composition and claim 35 particular minerals and claim 41 iodine, claim 42 ferrous amino acid chelate.

Kampangina et al. disclose a composition in a dried form containing vitamins and minerals, which can be made into a beverage which can contain artificial sweeteners (col. 4, lines 65-68, col. 7, lines 41-51). The further limitations of the claims from 30 to 44 have been discussed above and are obvious for those reasons. Therefore, it would have been obvious to use various minerals in the claimed composition.

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Claim 45 further requires a particular amount of aspartame in the beverage with a particular particle size and claim 57 that 82 % of the aspartame has a particle size of greater than 106 microns. As it is known that aspartame has a particular sweetness intensity and the particle size has been shown above in the use of a different sweetener, it would have been obvious to use other known sweeteners in the claimed size since the various claimed sweeteners have been equated as equal in the Markush groupings. The further limitations have been discussed above and are obvious for those reasons.

Claims 57 to 85 are to the use of aspartame as the sweetener. However, as the various sizes of particles have been disclosed as desirable, it would have been obvious to use the same particle size of sweetener in the claimed composition. The further limitations have been discussed above in regard to a different sweetener and are obvious for those reasons.

Claims 93-98 are to using the composition of the independent claims in a beverage. However, as above Kampanga et al. disclose the use of artificial sweeteners in beverages as does Menzi et al. and Valentine et al (abstract). Therefore, it would have been obvious to use sweeteners for their known functions in beverages.

### ***Election/Restrictions***

Applicant's election with traverse of claims 1-85 in Paper No. 8 is acknowledged. The traversal is on the ground(s) that 8. This is not found persuasive because the composition does not require the limitations of the method. The composition is to two or more ingredients, while the method requires mixing them with a particular amount of work input (claim 86.). This limitation is not required in the composition claims. Other methods of making the composition may be found of making the composition. It is noted that claims 93-98 are to the beverage composition. They will therefore be examined along with the composition claims.

The requirement is still deemed proper and is therefore made FINAL.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Helen F. Pratt whose telephone number is 703-308-1978. The examiner can normally be reached on Monday, Wednesday and Friday from 9:30 to 6:00 and Tues and Thurs. from 4:30 to 10 p.m.



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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Mr. Milton Cano, can be reached on (703) 3959. The fax phone number for the organization where this application or proceeding is assigned is 703-308-7718.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1193.

Hp 12-2-02

*H. Pratt*  
HELEN PRATT  
PRIMARY EXAMINER  
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PRIMARY EXAMINER